No. 93-1062

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1993

RECALL '92, INC., et al.,

Petitioners,

versus

EDWIN W. EDWARDS, Governor of the State of Louisiana, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the United States District Court for the Middle District of Louisiana and the United States Court of Appeals for the Fifth Circuit are contained in Petitioners Appendix to its Petition for a Writ of Certiorari. All references by Respondents in this opposition brief will be to those decisions contained in Petitioner's Appendix.

INTRODUCTION

The State of Louisiana through the named defendants, Edwin W. Edwards, Governor, Richard P. Ieyoub, Attorney General and W. Fox McKeithen, Secretary of State submit this Brief in Opposition to the Petition for Writ of Certiorari in order to point out material misstatements or omissions of fact or law set forth in the petition, in accord with this Court's Rule 15 as well as to present the state's arguments for denying the petition for writ of certiorari. Respondents will address these specific items of perceived misstatement or omission prior to the argument for the State's position for denying the petition.

STATEMENT OF THE CASE

This case involves a First Amendment challenge to Louisiana's electioneering law, LSA-R.S. 18:1462 which prohibits all electioneering activity as well as to prohibit the display of political signs, pictures, advertising and the distribution of campaign cards, or campaign literature of any description whatsoever, with a 600 foot radius of the entrances to polling places on election and absentee voting days in Louisiana.

Relying on the following this Court's decision in *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), the United States District Court found the challenged statute constitutional as creating a campaign-free zone around polling places and that the statute applied to both issues and parties whether or not they were on the ballot. See Appendix G. The Fifth Circuit Court of

Appeals affirmed that decision, see Appendix B. Petitioners now ask this Court to reverse and declare the statute unconstitutional, alleging two grounds, "(1) whether, consistent with the First Amendment, a state can proscribe non-ballot related political speech in areas outside polling places on election days, and (2) at what measurable distance from the polls does the government's restriction of political speech become an impermissible burden on First Amendment rights. Petition p. 4. It should be noted at the outset that the statute does not bar "political speech" but prohibits the activities set forth in the statute as interpreted by the United States District and Appellate Courts and the Louisiana Supreme Court on certification from the Fifth Circuit, *Schirmer, et al. v. Edwards, et al.*, No. 92-CQ-2829, Appendix E. All of these Courts correctly decided that LSA-R.S. 18:1462 did prohibit the solicitation of signatures in a recall petition and that the statute applied to that activity.

MISSTATEMENTS OR OMISSIONS OF LAW AND FACT

First, the challenged statute is incompletely set out, in the petition, in that sections B through F are omitted, p. 3 Appendix A, these sections were not challenged. Section B, set out below, is however, vital, in that it exempts private property, not used as a polling place, from the prohibition on the placing of political signs and pictures. This important section distinguishes two cases relied on by petitioner in the application:

LSA-R.S. 18:1462

A. Except as otherwise provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m., to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or within any place wherein absentee voting is being conducted, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or any place wherein absentee voting is being conducted:

(1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

(2) To remain within any such polling place or place wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or are of a polling place or after having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted.

(3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

B. The provisions hereof shall not apply to the placing and displaying, either by the owner,

> lessee, or lawful occupant thereof, or with the consent of such owner, lessee or occupant, of political signs or pictures on private property which is not being used as a polling place.

At p. 15 of the petition, it is alleged that there is a conflict between the 5th Circuit's decision in this case and the 11th circuit's decision in *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985). Initially respondents submit that *Clean-Up '84* was decided seven (7) years prior to the Court's landmark decision in *Burson v. Freeman, supra* (1992) and that *Burson* represents the rule in the United States and that there is therefore no conflict. Furthermore, *Clean-Up* is distinguished by the fact that the prohibition contained in the Florida statute did not exempt private property as does Louisiana's, see Section B above.

Petitioners also cite the post *Burson* case of *Calchera v. Procarione*, 805 F. Supp. 716 (E.D. Wisc. 1993) which found Wisconsin's statute prohibiting campaign speech within 500 feet of the polls unconstitutional. In *Calchera*, the Wisconsin statute did not exempt private property and therefore prohibited the placement of political signs on private property within the 500 foot radius. The Court was uncertain as to the validity of the 500 foot zone, see *Calchera*, p. 719, commenting on *Burson*,

> "This language might suggest that the plurality would have no problem with even a 500 foot boundary as prescribed in Section 12.03(2)."

What the Wisconsin Court had problems with and what was the reason for decision, the State submits, was the private property prohibition, as follows,

> "This is not a case where the legislature is regulating expression in a public forum; section

> 12.03 with its sweeping zone of protection, prohibits individual homeowners from expressing their political views on their own property. p. 720"

The Louisiana statute exempts private property, LSA-R.S. 48:1462 B.

In light of the above there is no conflict in the Circuits and the later District Court case is clearly distinguishable from the petition herein. The state also points out that the companion case relied on by petitioner at p. 12 & 13, *State of Louisiana v. Schirmer,* Appendix H is *not* a final judgment and is presently docketed in the Louisiana Supreme Court as docket No. 93-KA-2631. This is a criminal misdemeanor case and the State is appealing the judgment on the motion to quash the bill of information.

Second. Petitioners in brief, at p. 21 state that Louisiana's restricted zone around polling places dates only from 1960. This is incorrect. A restricted zone or barrier around polling places in Louisiana's statutes dates from 1894. A listing of the acts of the legislature incorporating some barrier is of record in this case and is listed below along with the size of the zone in that act.

(1) Act 181 of 1894, Section 17 created a 15 foot barrier in front of each polling place and a 10 foot barrier to its side.

(2) Act 137 of 1896, Section 41 prohibited any person from obstructing, hindering or delaying any voter on his way to a polling place and provided for a 6 foot barrier.

(3) Act 49 of 1906, Section 37, prohibited any person from buying, selling or offering anything of value to a voter, intimidating,

by threat or promise, any voter for the purpose of influencing his vote. It also provided for at least a six foot barrier.

(4) In 1914, Act 277 increased the barrier from six feet to fifty feet.

(5) Act 97 of 1922 continued the 50 foot guard rail, and prohibited anyone within the barrier, except commissioners, watchers, and voters actually voting. Also provided a penalty for any person who bought any vote or intimidated any voter.

(6) In 1960, Act 40 increased the barrier around the polling place to 600 feet. However, Act 221 of 1960 also increased the barrier to 300 feet and specifically repealed Act 40 of 1960. Act 40 of 1960 was again repealed by Act 32 of 1962.

(7) Act 221 of 1960 enacted LSA-R.S. 18:1534 with a 300 foot barrier. It also provided for candidates to place their campaign cards or sample ballots on a table near the entrance to the polling place, so that a voter could select one if he so desired, "free from the influence, solicitation or suggestion of any kind".

(8) Act 493 of 1972 amended LSA-R.S. 18:1534 to prohibit any person from polling or displaying campaign cards or sample ballots near the entrance to any polling place, thereby repealing the language in Act 221 of 1960.

(9) In 1980, Act 180 increased the barrier around polling places to 600 feet. (repealed LSA-R.S. 18:1534).

Louisiana has a 100 year history of providing some size of restricted zone around the voting area that was found necessary in *Burson*, to secure the state's compelling interest in preventing voter intimidation and election fraud, *Burson* p. 1855.

Third. Petitioners at p. 10, allege that the state did not present concrete evidence for the need of the 600 foot barrier enacted in 1980 by Act 180. This is incorrect. The record is replete with testimony proving the fact that the legislature considered the 300 foot barrier insufficient and raised the barrier to 600 feet for that reason. Representative Charles Lancaster, the author of Act 180 testified that the 300 foot limit "was not effective in having a polling place that was totally free from political influence on election days." (Transcript, Volume 3, p. 145). Representative Joe Accardo, Chairman of the House and Governmental Affairs Committee of the Louisiana House of Representatives, testified that he and that committee supported legislation increasing the distance from 300 feet to 600 feet in LSA-R.S. 18:1462. He stated,

> "I supported the legislation, . . . because in the District I live in, the 300 foot limit was very often not enough distance to keep people who were engaged in political activities from intersecting the voters who were going to the polls. Very often the 300 foot limit was – the parking lots were outside the 300 foot limit. Very often people parked on the street to get to the polling places and there were instances where there was political activity going on by various candidates and their supporters trying to talk to voters as they walked to the polls or try to get to the polls. (Transcript, Volume 3, p. 180).

The record is clear that the Louisiana legislature carefully considered the 300 foot limit and found it to be inadequate, then increased that limit to 600 feet to insure that Louisiana voters would be free of interference, fraud, intimidation and confusion at the polls on election day.

Fourth. Petitioners in brief at p. 18 make the statement that exit polling "is at least as intrusive and disruptive as the activity proposed by petitioner in the instant case which is the solicitation of signatures for a recall petition." Petitioners attempt to rely on exit polling and media interviewing cases, namely, *Daily Herald Company v. Munro,* 838 F.2d 380 (9th Cir. 1988); *NBC v. Cleland,* 697 F.Supp 1204 (N.D. GA. 1988); *CBS Inc. v. Smith,* 681 F.Supp 794 (S.S. Fla. 1988). These cases are not applicable to this question. Exit polling is news gathering activity undertaken after the voter has voted, not political activity, such as an attempt to solicit signatures on a recall petition or an attempt to campaign for a candidate.

The foregoing is submitted in accord with Rule 15. The following is the state's position on why the Judgments of the District Court and Court of Appeal are correct and that the petition for writ of certiorari should be denied.

SUMMARY OF THE ARGUMENT

LSA-R.S. 18:1462 prohibits the political activity listed therein including speech in the form of campaigning within 600 feet of a polling place on election day and during absentee voting. The decisions of the District Court and the Fifth Circuit Court of Appeals upholding

the constitutionality of that statute were mandated by this Supreme Court's recent decision *Burson v. Freeman*, 112 S.Ct. 1846 (1992). It is respondents' position that each state has the right to provide a campaign free zone around its polling places. That each state must rely on its own experience in deciding what size zone it should have. That Louisiana, like Tennessee in *Burson*, has provided such election laws for its citizens for approximately 100 years. That the Louisiana experience as evidenced by its legislative acts indicates that the 600 foot zone is deemed necessary for this purpose. That the statute is narrowly drawn in that it restricts First Amendment rights only while the polls are open on one or two days every years or so and at absentee voting places and that all other places, times and manner of political speech is left open and unrestricted. That this statute is necessary in order to provide Louisiana's citizens free and unencumbered access to the polls so that they may exercise their right to vote freely and without interference, intimidation or confusion.

It is the State's position that it is constitutional for the statute to prohibit non-ballot related activity such as the recall petition herein and without such a prohibition the statute would be virtually unenforceable.

It is further respondents' position that the statute, as found by the District Court, Court of Appeal and Louisiana Supreme Court on certification from the Fifth Circuit, prohibited in section A(3) & (4) the recall petition activity sought to be engaged in by petitioners. There is simply

no necessity to grant the writ to clarify *Burson* for its teachings are clear.

ARGUMENT

The basis of the lower court's decisions upholding the constitutionality of Louisiana's statute is this Court's decision in *Burson* recognizing the state's right to provide a campaign free zone around polling places on election day. The most powerful arguments for not granting the writ and for upholding the statute's constitutionality are contained in Justice Blackmun's decision in *Burson*. In that *Burson* settled the issues raised therein, Petitioner's claim that only two questions remain open for decision in this case. *First*, can Louisiana proscribe political activity, campaigning or politicking not related to items on the election ballot and *second*, is Louisiana's 600 foot campaign-free zone so impermissibly large as to render it unconstitutional.

WHAT SIZE ZONE IS PERMITTED?

Petitioners argue that the real question remaining is, at what measurable distance from the polls does the government's restriction on campaign activity become an impermissible burden on First Amendment rights. The answer to this question is again provided by *Burson* indirectly and is: Whatever distance that is deemed necessary by the State's citizens through their elected representatives in order to insure that the polls will be free from

voter intimidation, interference, election-fraud and confusion, until that zone interferes with First Amendment rights not related to the polling place.

Respondents stress and *Burson* states that the authorized goal of these statutes is to have a campaign free polling place. They are not designed to create difficulties for political activity at the polls, they are designed to eliminate it. Therefore, whatever distance that is necessary in each state's judgment, to accomplish the desired end is appropriate until that distance becomes unreasonable. New Hampshire had ten feet, Louisiana has 600 feet, Kentucky and Wisconsin have 500 feet, thirty-eight states have established campaign-free zones of 250 feet or less, Petition, p.7 None of these states are right or wrong. They simply have different judgments. This Court in *Burson* has upheld Tennessee's 100 foot zone. This question was addressed in *Burson* beginning at 112 S.Ct. 1856 as follows:

> "The real question is how large a restricted zone is permissible or sufficiently tailored. . . .
>
> Furthermore, because a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State "to the burden of demonstrating empirically the objective efforts on political stability that [are] produced" by the voting regulation in question. Citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 107 S.Ct. 533, 537, 93 L.Ed. 2d 499 (1986). . . .

Beginning at p. 1857 *Burson* continued,

> "Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." Id., at 195-196, 107 S.Ct., at 537-38 (emphasis added).

> "We do not think that the minor geographic limitation prescribed by § 2-7-111(b) constitute such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension."

Of course, at some distance from the polls, a campaign-free zone would be unconstitutional. *Burson* again addressed this, at p. 1857,

> "At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills v. Alabama, supra.*"

Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 484 (1966) struck down a law that made it a crime for a newspaper editor to publish an editorial election day urging readers to vote in a particular way. Louisiana's 600 foot zone, and the states at 500, 250 or less are not akin to *Mills* which involved no distance but was an outright ban on political speech. Louisiana does not have to draw the perfect distance. The statutory history reflects that in

1980 it considered 300 feet inadequate and amended the statute to increase the zone to 600 feet to accomplish the constitutionally protected purpose. The perfect distance may be 100, 200, 300, 400 or Hawaii's 1000 foot zone, the country's largest. In New Hampshire's judgment, 10 feet is adequate. In the absence of a federal election law on the subject, each state has the right to carve out the campaign free zone that it deems necessary. Louisiana's zone is not impermissibly large. *Burson* answers the questions raised in petitioner's writ application and the petition should be denied.

THE STATE CAN PROHIBIT NON-BALLOT RELATED CAMPAIGN ACTIVITY IN THE CAMPAIGN-FREE ZONE.

The answer to this remaining issue alleged by petitioner is clear to the effect that the statute may ban non-ballot related activity. Any other answer would render the constitutionally authorized zone meaningless for it would allow all other campaign activity or politicking other than ballot related activity. This would open the environs of the polling places to candidates seeking the same *captive audience* that the recall drive sought. Common sense teaches, what better place to find voters than at a polling place. Office seekers facing upcoming elections would descend on polling places to campaign while the voters voted. Some might even campaign for allies on that day's ballot until they were required to leave. Those in favor of a recall would compete for the voters attention with those opposed to the recall creating the kind of political free for all that 100 years of state legislative

history has sought to prevent, for one day (14 hours) and at one place. This would unquestionably increase voter interference, intimidation, election fraud and confusion. All the lower Courts in this case, including the Louisiana Supreme Court concurred that the statute banned the non-ballot related activity engaged in by petitioner. They found that sections (3) and (4) of LSA-R.S. 18:1462 prohibited the recall signs, stands and paraphernalia used by petitioner. These sections are set out below and appear at petitioner's Appendix A.

LSA-R.2. 18:1462

(3) To hand out, place or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

(4) To place or display political signs, pictures, or other forms of political advertising.

The Fifth Circuit held that Louisiana's statute banning all political activity described therein was even more defensible than the Tennessee statute upheld in *Burson* and would have answered some of Justice Stevens concerns expressed in his dissent in *Burson*. In any event, it is clear that without the total ban in the campaign-free zone the statute would be potentially useless. The Fifth Circuit in this case, reported at 2 F.3d 117, held correctly at p. 123,

> "Accordingly, we find that a total ban on politicking within the campaign-free zone is not overboard. In fact, the total ban in the present context is the most defensible position. The state has a compelling interest in protecting its voters and the proffered reasons given by the legislature demonstrate a reasonable compromise to

> the problems that necessitated the campaign-free zone in the beginning."

That the states or the federal government have the constitutional power to ban campaign activity or solicitation activity in certain public places is well settled by recent decisions in the following cases. In *U.S. v. Kokinda*, 497 U.S. 720, 111 L. Ed. 571, 110 S.Ct. 3115 (1990) this Court upheld a postal service regulation prohibiting solicitation on postal service premises and the distributing of literature on a sidewalk near a post office entrance. Of particular interest to this case is the *Kokinda* Court's discussion of the nature of solicitation at p. 3123 citing *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986),

> " 'Soliciting funds in an inherently more intrusive and complicated activity than is distributing literature.' . . . [it is] more intrusive and intimidating than an encounter with a person giving out information."

In the instant case, petitioners desired to set up recall stands near the polling places to have access both to the captive audience of those desiring to vote and also and even more intrusive, the ability to have those who had voted be able to return to the polls and check their registration signatures while others were attempting to vote. In *Longo v. U.S. Postal Service*, 953 F.2d 790 (2nd Cir. 1992) the Second Circuit held that a postal service regulation prohibiting campaigning for election to public office on postal service property was constitutional. On remand after this Court's *Burson* decision, the *Longo* court changed its rationale but reached the same decision, namely that the postal service could prohibit campaigning on postal service property. This is a year round ban.

The electioneering statute is a one day ban and is as narrowly drawn as is necessary to accomplish the desired end, which is a campaign free polling place.

The Fifth Circuit and the District Court were correct in holding that the statute, in banning the non-ballot related activity the subject of this case, is constitutional.

CONCLUSION

This Court in *Burson v. Freeman, supra,* has answered all of the questions presented in petitioner's writ application. In order to further its constitutionally protected compelling interest in preventing voter intimidation, election fraud, interference and confusion, Louisiana has established, after 100 years of statutory history, a 600 foot campaign-free zone around the polls on election day and absentee voting days. All fifty states have such zones. They are narrowly drawn as to the distance and most importantly *time,* namely one or two days. The statute bans the non-ballot related activity listed therein which included the recall petition, the subject of this case. This is a petition that simply does not need to be granted because this case was in essence, decided by this Honorable Court in 1992 in *Burson v. Freeman.*

A quote from the petition for certiorari best expresses the philosophical differences between petitioner and respondents. It is found at page 18 and cites a phrase from this Court's decision in *City of Houston v. Hill,* 482 U.S. 451, at 452, 107 S.Ct. 2502 (1987) as follows, "a certain-amount of expressive disorder is inevitable in a

free society and must be protected if freedom is to survive." Both this Supreme Court in *Burson* and the legislatures of fifty states have determined that this "expressive disorder" shall not interfere with voting at or near the polling places on election day.

For the above reasons, **Respondents** ask that this Honorable Court deny the petition for Writ of Certiorari in this matter.

Respectfully submitted,

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